STATE OF MICHIGAN

COURT OF APPEALS

CHARLES L. SWANSON,

Plaintiff/Counterdefendant-Appellee,

v

SHAGBARK DEVELOPMENT, INC.,

Defendant/Counterplaintiff-Appellee,

and

LEE VAN POPERING,

Defendant-Appellant,

and

JAMES SUSCHIL and WINDRUSH, INC.,

Defendants-Appellees,

and

BRETT N. RODGERS, Receiver,

Appellee.

JOHN KNOX, MARY KNOX, KATHLEEN R. MILLER, ROBERT P. MILLER, CRAIG SAURMAN, LAVERNE C. SMITH, ROGER WETHERBEE, NANETTE WETHERBEE, DAVID WILKINSON, PATRICIA WILKINSON, GORDON STANARD, and SANDRA STANARD,

Plaintiffs-Appellees,

UNPUBLISHED
October 27, 2005

No. 259886
Kent Circuit Court
LC No. 01-009630-CZ

v

No. 259908
Kent Circuit Court
LC No. 02-000571-CK

NORTHLAND MANAGEMENT, INC.,

Defendant/Cross-Defendant,

and

OMM ENGINEERING, INC.,

Defendant/Cross-Plaintiff-Appellee,

and

SHAGBARK DEVELOPMENT, INC.,

Defendant/Cross-Defendant-Appellee,

and

LEE VAN POPERING,

Defendant/Cross-Defendant-Appellant,

and

PHILLIP J. VOGELSANG,

Defendant/Cross-Plaintiff,

and

AUTO OWNERS INSURANCE COMPANY,

Intervening Plaintiff,

and

BRETT N. RODGERS, Receiver,

Appellee.

CHARTER TOWNSHIP OF CALEDONIA,

Plaintiff/Counterdefendant/Cross-Defendant-Appellee,

v

No. 259909
Kent Circuit Court
LC No. 02-009843-CE

SHAGBARK DEVELOPMENT, INC.,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee,

and

SIMMONS TITLE COMPANY,

Defendant/Third-Party Defendant-Appellee,

and

SHAGBARK CONDOMINIUM ASSOCIATION,

Third-Party Defendant/Cross-Plaintiff/Third-Party Plaintiff-Appellee,

and

LEE VAN POPERING,

Defendant/Cross-Defendant-Appellant,

and

WINDRUSH, INC., JAMES SUSCHIL, and OMM ENGINEERING, INC.,

Cross-Defendants-Appellees,

and

NORTHLAND MANAGEMENT, INC., PHILLIP J. VOGELSANG, and SHAGBARK WATER COMPANY, INC.,

Cross-Defendants,

and

BRETT N. RODGERS, Receiver,

Appellee.

Before: Kelly, P.J., Whitbeck, C.J. and Meter, JJ.

PER CURIAM.

These consolidated cases arise out of problems plaguing the Shagbark Condominium Complex in Caledonia Township. Lee Van Popering, an owner of both the development company and building company responsible for the Shagbark Condominium Complex, appeals by leave granted the trial court's October 12, 2004 order granting injunctive relief to plaintiff residents of the condominium complex following a bench trial. The court ordered Shagbark Development to remedy storm water drainage problems at the complex and ordered that a receiver be appointed over Shagbark Development, Northland Management, Van Popering, Windrush, Inc., and Shagbark Water Company. Van Popering also appeals by leave granted the December 14, 2004, order of the trial court appointing the receiver, which order was amended on December 29, 2004. We vacate both the October 12, 2004 and December 29, 2004 orders and remand.

I. Basic Facts and Procedural Background

As a result of a failure of the storm water system at the condominium complex, three major floods occurred between September 2000 and July 2001. Thereafter, the residents and their condominium association began pumping the storm water detention pond every time it rained. They did so to ensure that the pond did not overflow and cause additional major flooding. However, the residents' pumping system is not a permanent solution to the intrinsic problems with the storm water system. Several lawsuits were filed in the Kent Circuit Court related to the condominium complex, one of which was filed by several residents of the complex seeking redress and remedies for the deficient storm water system and one of which was filed by Caledonia Township, which also sought to have the deficiencies in the storm water system remedied. The trial court consolidated the cases.

In June 2004, the trial court held a bench trial to hear and decide issues related to pending claims for injunctive relief based on claims of trespass and nuisance brought by plaintiff residents of the condominium complex and by Caledonia Township. Following the bench trial, the trial court issued an opinion, making detailed findings of fact and concluding that flooding, which occurs when there is no pumping of the pond, was not an actionable trespass, a public nuisance, or a private nuisance. Nevertheless, the trial court determined that the flooding was actionable:

> Although it does not amount to either an actionable trespass or an actionable nuisance, the flooding does violate what *Bennett v Eaton County*, 340 Mich 330, 335 (1954), characterized as this State's "law of surface waters." That

law is a derivative of the overlapping concepts of trespass and nuisance applied to the unique circumstance of surface waters.

a. While an owner of land must accept all water which naturally flows onto that land from other properties, *Id.*, at 335-336, the owners of the latter cannot collect water in ways which increase the quantity or velocity of the flow. *Id.*, at 336. See also *Miskotten v Drenten,* 318 Mich 538, 545 (1947). The reverse flow created by the drainage system does both.

b. Nor may the owner of one parcel of land utilize it so as to impair the natural flow of water off adjoining property. *Robinson v Belanger,* 332 Mich 657, 662 (1952); and *Reed v Soltys,* 106 Mich App 341, 349 (1981). In addition to generating a reverse flow, Shagbark's inadequate drainage system also dams natural drainage off the land on which sit the resident's units.

In a footnote, the trial court stated:

That the parties have utilized the law of nuisance does not preclude this Court from deciding the case based on the law of surface waters. ". . . [A]ddressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle." *Mack v Detroit,* 467 Mich 186, 207 (2002). Complex or novel issues should seldom be so addressed, *Candelaria v BC General Contractors, Inc,* 236 Mich App 67, 83 (1999), *lv den* 462 Mich 852 (2002), but the law of surface waters is well-settled, and its applicability to this case is plain.

The trial court ordered, in relevant part, that Shagbark Development remodel the storm water drainage system and correct the residents' basement flooding problems. It also enjoined construction unrelated to the remodeling, and it ordered the appointment of a receiver over Shagbark Development, Northland Management, Shagbark Water Company, Windrush, and Van Popering to ensure compliance with its order.

II. Due Process

On appeal, Van Popering argues that the trial court violated his due process rights when it granted injunctive relief based on the law of surface waters, which was not pleaded by the parties and was not presented to or argued before the trial court. We agree that the trial court's decision to grant injunctive relief based on the law of surface waters constitutes a fundamental due process violation that requires reversal of the court's October 12, 2004 order.

We review the alleged due process violation de novo. *Reed v Reed,* 265 Mich App 131, 157; 693 NW2d 825 (2005).

In *Reid v Michigan,* 239 Mich App 621, 630; 609 NW2d 215 (2000), the trial court imposed liability on the defendants on the basis that the plaintiffs' arrests were not based on probable cause. This Court held:

> To the extent that the court imposed liability on the basis that the arrests were not based on probable cause, we must reverse that finding because at no time did plaintiffs ever allege a violation premised on a lack of probable cause (Const 1963, art 1, § 11). A trial court does not have the authority to grant relief based on a claim that was never pleaded in a complaint or requested at any time before or during trial. Further, although trial courts have the power to allow posttrial amendment of pleadings to conform to the proofs absent a showing of surprise or prejudice, plaintiffs never moved to amend their complaint to conform to the proofs. Accordingly, because a claim that plaintiffs' arrests lacked probable cause was never pleaded or tried by express or implied consent of the parties, see MCR 2.118(C), the court lacked authority to find that defendants were liable to plaintiffs on the theory that plaintiffs' constitutional rights were violated because they were arrested without probable cause. [*Id.* at 630 (citations omitted).]

Similarly, in *City of Bronson v American States Ins Co*, 215 Mich App 612, 618-619; 546 NW2d 702 (1996), this Court determined that the trial court exceeded its authority because its ruling pertained, in part, to a landfill that was not the subject of any claims before the trial court. This Court determined that, by ruling with regard to the landfill, the trial court sua sponte amended the plaintiff's complaint to add an additional claim. *Id.* at 619. The claim was not raised in the pleadings and was not tried by consent of the parties. *Id.* Accordingly, this Court vacated the portion of the trial court's order related to the landfill. *Id.*[1]

In this case, both plaintiff residents and plaintiff township sought injunctive and equitable relief based on claims of nuisance related to the existing storm water system. The trial court determined that relief could not be granted on the pleaded nuisance theories. It then determined that a cause of action based on the law of surface waters may exist, and it applied that law to the facts of the case. Van Popering had no notice that he would be required to defend a claim brought under the law of surface waters, the claim was never pleaded, and no party moved during or after trial to amend their pleadings to include that claim or theory as a basis for recovery. Moreover, the claim was not tried by the consent of the parties. MCR 2.118(C). The trial court violated Van Popering's fundamental due process rights by relying on the law of surface waters.

We disagree with the trial court that *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002), provides the trial court with authority to create a theory under which plaintiffs could prevail. In *Mack*, the Court was presented with the question whether the Detroit City Charter

---

[1] See also *NAACP-Flint Chapter v Governor of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued November 24, 1998 (Docket No. 205264), wherein this Court held that the trial court's grant of an injunction based on grounds that were neither pleaded nor raised before or during trial violated principles of due process because the defendant had no notice of the need to defend against the claim. Although the decision in *NAACP-Flint Chapter* lacks precedential value under the rule of stare decisis, MCR 7.215(C)(1), we find its reasoning persuasive. See *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

created a private cause of action for discrimination. *Id.* at 189. The Court held that regardless of whether the charter created the private cause of action, such a cause of action would contravene the governmental tort liability act, MCL 691.1407. *Id.* at 189-190. The Court found it necessary to discuss and apply the law of governmental immunity in order to reach a correct decision on the preemption issue pending before it. *Id.* at 207-208. In this case, it was entirely unnecessary for the trial court to invoke the law of surface waters to decide the claims pending before it. The trial court rejected the claims made by plaintiffs in support of injunctive or equitable relief based on their own lack of merit. The trial court improperly found an alternative theory on which plaintiff residents could prevail. We therefore vacate the trial court's October 12, 2004 order granting relief based on the law of surface waters. If on remand, the surface waters theory, or other theories permitted by the trial court in its discretion, are pleaded, presented to, and argued before the trial court, then the trial court may decide these issues.

III. Receivership

Although our decision to vacate the October 12, 2004 order renders it unnecessary to review Van Popering's issues challenging the trial court's orders appointing a receiver, we will briefly address Van Popering's challenges as they may arise again on remand. First, we note it is within the trial court's discretion to appoint a receiver. *McBride v Wayne Circuit Judge*, 250 Mich 1, 4; 229 NW2d 493 (1930); *Band v Livonia Assoc*, 176 Mich App 95, 104; 439 NW2d 285 (1989); *Wayne Co Jail Inmates v Wayne Co Chief Executive Officer*, 178 Mich App 634, 658-659; 444 NW2d 549 (1989). "The appointment of a receiver may be appropriate when other approaches have failed to bring about compliance with the court's orders." *Band, supra* at 105.

Despite Van Popering's objections, the trial court had the authority to appoint a receiver. MCL 600.2926 provides:

> Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law. This authority may be exercised in vacation, in chambers, and during sessions of the court. In all cases in which a receiver is appointed the court shall provide for bond and shall define the receiver's power and duties where they are not otherwise spelled out by law. Subject to limitations in the law or imposed by the court, the receiver shall be charged with all of the estate, real and personal debts of the debtor as trustee for the benefit of the debtor, creditors and others interested.
>
> The court may terminate any receivership and return the property held by the receiver to the debtor whenever it appears to be to the best interest of the debtor, the creditors and others interested.

In *Reed, supra* at 139, a divorce case, the trial court appointed a receiver to sell land owned by the parties in Oakland County. The land was worth between $2.9 and $10 million. *Id.* at 138. In discussing the appointment of the receiver, this Court stated:

> A circuit court has broad jurisdiction to appoint a receiver in an appropriate case. "Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law."

> MCL 600.2926. This statute has been interpreted as authorizing a circuit court to appoint a receiver when specifically allowed by statute and also when no specific statute applies but "the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction." The purpose of appointing a receiver is to preserve property and to dispose of it under the order of the court. In general, a receiver should only be appointed in extreme cases. But a party's past unimpressive performance may justify the trial court in appointing a receiver. [*Id.* at 161-162 (citations omitted).]

In this case, the trial court was sitting in equity, deciding issues related to injunctive relief sought by the township and by condominium residents who had been affected by flooding concerns since September 2000. While no statute specifically authorized the appointment of a receiver, the facts and circumstances rendered the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction. Shagbark Development, which was in charge of the project, and Northland Management, the builder, had not remedied the known problems with the storm water system. They appeared to have abandoned the project and left the condominium association and its residents to monitor and control the pumping of the pond to ensure no further flooding. Van Popering testified that there was no money to rectify the situation. When the trial court heard the motion to vacate the October 12, 2004 order, before entry of the order appointing the receiver, Shagbark Development and Northland Management reiterated that they did not have any money to fix the problem. Yet, there was evidence that there were still one hundred lots left to build and sell. Van Popering claimed that, if he received building permits, he could continue the project and make money. This claim supports the inference that there must have been a source of funding available. The trial court was legitimately concerned, based on this evidence, that its order to fix the storm water problem would not be complied with by Shagbark Development, Northland Management, or Van Popering, who were continuing to argue a lack of funds.

Further, it was undisputed that, while the cases were dragging on, property attendant to the complex project was being lost. The attorney for Van Popering admitted that seven acres of project property was lost in forfeiture to Swanson. There was also evidence that taxes were not being paid on the property. Eventually, a lien was placed on the property for payment of the taxes. Thus, there was no abuse of discretion in the trial court's appointment of a receiver during the pendency and resolution of these cases where the trial court was concerned about ensuring compliance with its October 12, 2004 rulings.

However, because we vacate the October 12, 2004 order, a receiver is no longer necessary to effectuate compliance with that order. Thus, the trial court's December 29, 2004 amended order appointing a receiver is also vacated. Nonetheless, while this case proceeds to a proper resolution of any issue properly pleaded on remand, and if the trial court again deems it necessary, it may consider and order the appointment of a receiver.

Based on our resolution of these issues, we need not address the other issues raised in this appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ William C. Whitbeck
/s/ Patrick M. Meter